

Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking

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ABSTRACT

Much public participation in executive branch rulemaking occurs not through negotiation or the notice and comment process, but rather through instruments, such as hearings and informal communications, that fall in important ways between these two archetypes. This research reports on a line of inquiry that takes advantage of recent developments in information and communication technology to track public involvement in all of its forms in a manner that is by historical standards comprehensive and broad. First, a data collection protocol is designed that makes great use of emerging electronic repositories of information about rulemaking, most notably agency dockets that are accessible via the Internet. Second, this protocol is implemented for 584 actions reported as completed by the Department of Transportation between 2001 and 2003. The analysis indicates that not only was there indeed much participation "between" commenting and negotiation, but also that there were four main participatory regimes in these rulemakings: (1) actions where there was no discernible public input, (2) conventional notice and comment proceedings, (3) cases where conventional proceedings were complemented with other forms of input, and (4) instances where these other forms served as substitutes to the conventional approach. In the broadest sense, the methodological approach and substantive findings suggest that researchers and practitioners are on the cusp of a new era in rulemaking, one in which the continued application of information technology has the potential to transform both the conduct and management of rulemaking and the scope and nature of the knowledge that can be generated about this most important mode of policymaking.

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INTRODUCTION

Rulemaking is one of the central ways in which public policy is made in the contemporary United States. In rulemaking, executive branch agencies formulate and issue decisions that carry the full force of law, much like official acts of Congress, the president, and the Supreme Court. The collective impact of these bureaucratic decisions is enormous. Recent estimates suggest that federal health, safety, and environmental rules alone produce more than \$250 billion in annual benefits. These benefits, of course, are delivered only at great cost, perhaps as much as \$230 billion per year (Office of Management and Budget 2001, 3).¹ Viewed one way, rulemaking is invaluable in that agencies are uniquely well situated to craft solutions to public problems of all varieties that other institutions of government are unable or unwilling to address. From another perspective, the ubiquitous empowerment of officials who are not electorally accountable to the public is problematic in a democratic political system.

One way in which the benefits of rulemaking can be realized in a manner broadly consistent with principles of democratic governance is through the direct input and influence of those who hold a stake in agency actions. For more than a half century, the Administrative Procedure Act (APA) has laid out the fundamental process that governs public participation in rulemaking. Under the APA, agencies are generally required to provide notice of their intention to issue a rule and to allow interested parties an opportunity to comment on proposed policies. In many respects, this notice and comment process has served both agencies and interested parties quite well, bringing a measure of regularity and transparency to an inherently complex and specialized mode of policymaking. It has, in fact, been called "one of the greatest inventions of modern government" (Davis 1969, 65).

Rulemaking under the APA, however, is not without its shortcomings. It is not uncommon for rules to face significant delays during their development and to be met with legal challenges upon their completion. One reason for these difficulties is that public comments often stake out extreme positions, conceal information about stakeholder knowledge and preferences, and focus on pointing out flaws in agency proposals (Kerwin 2003, 197-98). In general, concerns about a "malaise" in rulemaking have prompted observers

¹ The uncertainty surrounding these figures, particularly those pertaining to benefits, is enormous. As a result, the magnitude of the net benefits of social regulation, and even whether these benefits are positive or negative, has not been established with any degree of precision (Office of Management and Budget 2001).

and participants to seek out approaches that might serve as effective complements or substitutes for the notice and comment process (Eisner 1984, Harter 1982). Chief among these approaches is negotiated rulemaking, where the authority to craft a proposed rule is placed in a committee composed of agency officials and parties from outside government with a stake in the action. Typically, negotiated rulemaking committees are charged with reaching unanimous concurrence among their members, on the idea that such consensus will reduce delay and litigation in subsequent stages of the process.

The emergence of negotiated rulemaking has sparked a lively debate regarding the relative merits of consensus-oriented participation and the conventional approach to public involvement laid out in the APA. By some accounts, negotiation is successful in expediting the process of rulemaking and in enhancing stakeholder satisfaction with both the process itself and the outcomes that ultimately result (Kerwin and Furlong 1992, Langbein and Kerwin 2000). Other accounts, in contrast, cast doubt on the notion that negotiated rulemaking reduces either the time it takes to develop rules or the amount of litigation that is associated with agency actions (Balla and Wright 2003, Coglianese 1997).

Although this debate has salient implications for the management and accountability of rulemaking, the debate fails to consider adequately that many rules are developed neither via negotiation nor conventional APA proceedings. Rather, much public participation occurs in a manner that might be described as “between” the archetypes of commenting on proposed rules and serving on negotiated rulemaking committees. In June 2003, for example, the Federal Motor Carrier Safety Administration implemented new rules governing the duty and rest periods for operators of commercial motor vehicles, in an effort to reduce the incidence of crashes attributable at least in part to driver fatigue and drowsiness. During this rulemaking, interested parties were not only offered the opportunity to comment on the agency’s proposed rule, they were also invited to take part in collaborative forums that entailed some but not all of the features of negotiated rulemaking. These forums included eight public hearings that were held in May, June, and July 2000, as well as three follow-up roundtables that occurred later that year (U.S. Department of Transportation, Federal Motor Carrier Safety Administration 2003). The aims of these forums were not to generate unanimous concurrence regarding the substance of the proposed rule, but to foster collaboration on a variety of important themes and issues that had arisen during the rulemaking.

In general, the modes through which participation in rulemaking occurs can be classified on the basis of a few key traits. In one category are opportunities to submit written comments in response to

agency notices. Such opportunities arise not only in the context of proposed rules, but also during stages of the process when agencies are seeking feedback on their initial ideas and are looking to resolve a few last impediments to promulgation. On occasion, agencies solicit reply comments, which enable stakeholders to respond to the arguments and evidence presented during regular comment periods. Some forms of participation bring agencies and stakeholders face-to-face with one another in interactive settings, as is the case with roundtables, public hearings, and informal meetings. Finally, deliberation is the aim when agencies turn to groups of stakeholders who are organized into advisory committees and charged with researching particular issues, weighing in on agency proposals, and offering advice on rulemaking agendas. In the extreme, such deliberation can take the form of negotiated rulemaking, in which committee members are transformed from parties with a stake in agency actions into policymakers themselves.

Why is it important to recognize explicitly and account for the rich array of forms of public participation that characterize contemporary rulemaking? At a fundamental level, a disproportionate focus on negotiation and conventional APA mechanisms obscures much about how many rules are actually developed. Although the diversification of participation has not gone undocumented (Kerwin 2003, 64-69), it is nevertheless the case that a systematic, large scale inventory of the use of forms of public involvement has not yet been taken. As a result, basic descriptive questions remain unanswered. What is the full complement of outlets that exist for stakeholders seeking to participate in the making of rules? How often, in practice, are these various outlets utilized?

The aim of this research is to take advantage of recent advances in information and communication technology to close the descriptive gap in our knowledge about participation in rulemaking. Specifically, this research develops a new protocol for cataloguing information about public involvement in a large number of rulemakings and implements this protocol for 584 actions reported as completed by the U.S. Department of Transportation (DOT) between 2001 and 2003. In part, the protocol exploits an emerging resource in rulemaking—electronic docket systems that provide, via the Internet, ready access to comprehensive sets of written records on a rule-by-rule basis. In the most immediate sense, the payoff from this empirical approach is an inventory of the forms of participation that occurred during DOT rulemakings in the period under investigation, as well as how often the agency and its stakeholders turned to each of these forms. More broadly, the design and application of the data collection protocol demonstrate that information and communication technology has the potential to transform the scope and method of research on rulemaking

processes and outcomes fundamentally. As will become apparent below, knowledge about rulemaking has historically been generated, for the most part, via studies that focus on small numbers of rulemakings and that collect information about very limited sets of attributes of these rulemakings. Although these studies have undeniably enhanced the theory and practice of rulemaking, more generally applicable approaches and insights are now coming into the reach of scholars, stakeholders, and agency officials. By tracking information about public involvement in all of its forms for 584 DOT rulemakings, the research presented here provides a roadmap for one basic way in which digital technologies can be exploited to shed fundamental new light on this most important mode of policymaking in the contemporary American political system.

COMMENTING, NEGOTIATION, AND PARTICIPATION IN BETWEEN

Public participation in rulemaking is a relatively new focal point in much research on executive branch policymaking.² The research that currently exists can be classified according to two salient characteristics: (1) the form of participation under examination, whether commenting, negotiation, or some other variant, and (2) the methodological approach, including the number of rules being considered and the approach taken to data collection, whether archival or based on surveys. Taken together, this research both identifies some basic patterns in participation and demonstrates the need for an initiative designed to document these patterns more fully.

THE NOTICE AND COMMENT PROCESS

There have been a handful of analyses of participation under conventional APA proceedings. Some of these analyses provide insight into the basic parameters of the notice and comment process. For example, evidence suggests that more than half of all final rules are issued without prior publication of a notice of proposed rulemaking (Kerwin 2003, 179-80). In those instances where interested parties are afforded an opportunity to comment on agency proposals, stakeholder participation varies enormously, with some proposals attracting little or no attention and others generating as many as several thousand

² As one exception, legal scholarship has long considered participation in rulemaking from a variety of normative and practical perspectives (Lubbers 1998, Stewart 1975). In addition, public involvement in general has figured prominently in case studies of high-profile executive branch decisions, such as the Federal Trade Commission's 1966 mandate that health warnings be placed on cigarette packages (Fritschler and Hoefler 1996).

responses (Golden 1998, West 2004). In the extreme, particularly salient and controversial proposals can be met with astonishing displays of support and opposition. One such display occurred in 1991, when the Health Care Financing Administration (HCFA) received nearly 100,000 comments on its proposal to restructure fundamentally the way in which the Medicare program pays for physician services (Balla 2000).

Are there any discernible patterns in the types of stakeholders that are generally most active in responding to proposed rules? In an examination of eleven rules issued by three agencies, Golden (1998) finds that business interests were, in all but two instances, more inclined to submit comments than representatives of other segments of society. Although a similar pattern has been uncovered for other rulemakings (Furlong 1999, Magat, Krupnick, and Harrington 1986), it is not always the case that business interests and other targets of agency actions are more regular participants than the expected beneficiaries of these actions. For example, physician specialties that were targeted for payment decreases in the restructured Medicare fee system were not more likely to submit comments on HCFA's proposal than the intended beneficiaries of the reform process (Balla 2000).

Finally, researchers have taken on the difficult, yet crucial task of assessing the influence of public comments on agency decisions. The consensus at this point is that although agencies consider comments carefully, proposals are generally altered very little in response to the arguments and evidence raised by stakeholders (Golden 1998, Kerwin 2003, Magat, Krupnick, and Harrington 1986). As West (2004, 67) puts it: "Changes are made frequently enough during the comment phase of rulemaking, but they tend to be small and painful, and they are often subtractive rather than innovative or additive."

There are, of course, exceptions to this general pattern. The HCFA made significant changes in Medicare physician fees across its proposed and final rules, in part as a response to comments submitted by physicians from all types of specialties (Balla 1998). More broadly, agency officials from across the government acknowledge, when surveyed, that comments can be more effective in influencing rulemaking than other modes of participation, including involvement in negotiated rulemaking committees (Furlong 1999, 53-7). The documentation of such nuances serves not only to underscore the diversity of notice and comment rulemaking in practice, but also the relative infancy of the effort to identify the factors that account for this procedural richness.

NEGOTIATED RULEMAKING

One of the fundamental lessons to emerge from research on negotiated rulemaking is that very few rules have been developed in this way, despite significant support and encouragement from scholars, the White House, members of Congress, and other interested parties (Kerwin 2003, 197-202). The Environmental Protection Agency (EPA), a leader in the application of deliberative approaches, initiated fewer than two dozen negotiated rulemakings between 1983 and 1996 (Coglianese 1997, 1274). Similarly, of the 204 major rules that were issued by federal agencies between March 1996 and June 1999, only four were made with the help of negotiated rulemaking committees (Balla and Wright 2003, 196).

The infrequency with which rules are negotiated, however tallied, is not viewed as at all surprising. At one level, negotiated rulemaking is costly to both agencies and stakeholders (Kerwin 2003, 197-202). Survey research indicates that participants in negotiated rulemakings devote more staff hours, legal expenses, and information collection resources to their efforts than do participants in conventional APA proceedings (Langbein and Kerwin 2000, 618-20). At another level, it is well established that negotiated rulemaking is neither necessary nor well suited for a wide variety of decision making contexts in which agencies find themselves (Harter 1982, 42-52). For example, unanimous concurrence is not likely to emerge easily when there are large numbers of stakeholders competing for access to and influence over committee proceedings. Nor are disputes over fundamental values, such as the extent to which costs should be considered when setting occupational safety and health standards, generally amenable to resolution via negotiated rulemaking.

So under what conditions is negotiated rulemaking actually used? The evidence suggests that agencies, which typically have jurisdiction over decisions regarding the convening of negotiated rulemaking committees, do in fact make good use of their discretion. For example, EPA rules “that affect the broadest number of organizations have never been selected for negotiated rulemaking” (Coglianese 1997, 1318). As a general rule of thumb, agencies avoid negotiating rules that are particularly significant in their scope and importance, as well as those that are most likely to be subject to extensive delays and intense litigation (Balla and Wright 2003, Coglianese 1997). This hesitance, however prudent, does not imply that agencies eschew interactive and deliberative approaches altogether. Rather, as Kerwin (2003, 201) cogently observes, “few important rules in the future will be developed without the use of one or more of the features of formal negotiations.” With this observation in mind, the salience of negotiated rulemaking cannot be judged solely by the frequency with

which it is used or without acknowledging that it is but one of many complements or substitutes to rulemaking under the APA.

OTHER FORMS OF PARTICIPATION

Given the presumed prevalence of modes of participation that occupy the ground between the archetypes of negotiated rulemaking and the notice and comment process, surprisingly little is known about the parameters that govern the use and efficacy, however judged, of these modes. As far back as the turn of the twentieth century, there were documented instances where public hearings, advisory committees, and other forms of interaction and deliberation played major roles in the development of rules (Kerwin 2003, 160-65). More systematic evidence, however, has only begun to emerge more recently. Surveys indicate that virtually all organized interests report attending hearings and engaging in informal contacts with agency officials. These surveys also reveal that groups generally view hearings as being less effective outlets for influencing rulemaking than either written comments or informal communications (Kerwin 2003, 190).

Advisory committees have been an ongoing focal point of research on public involvement in agency policymaking. Advisory committees are organizations of nongovernmental officials established by Congress, the president, or agencies to provide advice and recommendations to decision makers in the executive branch. The operation of these organizations is governed by the Federal Advisory Committee Act (FACA), which mandates, among other things, that advisory committees be balanced in their memberships. Issued in 1972, this mandate was a reaction to the historic domination of advisory committees by business interests. As one observer at the time colorfully put it:

I don't suppose any government at any time can keep all the foxes from stealing any of the chickens every now and then, but I don't know why in the name of the Almighty we have to build fox dens next to the chicken house, which is what we are doing with most advisory committees. Generally, they are an extension of the business lobbying operation. (Pika 1983, 308).

Did FACA's balance requirement lead to a diversification of participation in the advisory committee system? Some evidence indicates that although advisory committee membership is common among organized interests of all types, business groups nevertheless maintain important representational advantages (Petracca 1986, Schlozman and Tierney 1986). These advantages, however, are far from universal (Chin and Lindquist 2003). Early in its lifespan, the

Department of Agriculture's National Advisory Committee on Meat and Poultry Inspection was largely controlled by groups such as the American Association of Meat Processors. This control has eroded significantly over the years, as organizations like the Safe Food Coalition and Center for Science in the Public Interest have become active participants in the advisory committee's work (Balla and Wright 2000, 178-80). In general, diversity in purpose and membership appear to be defining characteristics of the nearly one thousand advisory committees that currently operate within the executive branch (Balla and Wright 2000, 2001).

THE TASK AHEAD

Although, as this review vividly demonstrates, much is already known about public involvement in rulemaking, it is also apparent that there is a real need for research that collects and analyzes information about commenting, negotiation, and other modes of participation for a large number of agency actions. Such an endeavor would be useful for more sharply distinguishing general patterns in participation from episodes that are idiosyncratic, as well as for conceptualizing participation as a unified, coherent phenomenon rather than as a series of distinct, mostly unconnected occurrences. Until very recently, this kind of research orientation has been a practical impossibility due to limitations in data availability. Specifically, the official records of rulemakings have existed in paper form only, in docket rooms that are for the most part accessible solely via in-person visits that present researchers with formidable logistical difficulties. The ongoing emergence of electronic, Internet-based docket systems, as well as related advances in information and communication technology, has begun to change this situation fundamentally, bringing researchers, interested parties, and agency officials themselves to the cusp of a new era in rulemaking.

In 2002, with the passage of the E-Government Act, the executive branch launched in earnest an initiative that will ultimately lead to the creation of an online docket management system that supports and documents the rulemaking activities of agencies from across the federal government.³ In combination with other Internet resources, such as electronic access to the Federal Register, the docket management system will make it possible for researchers to identify rules and to retrieve the records of these rules in a manner that is, by historical standards, stunningly straightforward and efficient. This

³ See www.regulations.gov for an overview and update on the current status of the eRulemaking Initiative.

newfound ability will in turn facilitate the study of public involvement in the making of rules on a scale much greater than the research that has to this point been carried out.

Until the docket management system becomes fully operational, the capability for such research is limited to rules issued by agencies that have established online dockets of their own, in advance of the government-wide effort. A leader in this regard is the DOT, which in the mid-1990s became the first agency to make its docket system completely accessible via the Internet.⁴ Due to the historical significance and comprehensive nature of its docket, the DOT is a sensible and logical place for initially exploring and demonstrating the potential promise of information technology in opening new avenues of inquiry and generating distinctive insights into the operation of rulemaking.

In this vein, the research presented here gathers and presents information about 584 actions completed by the DOT between 2001 and 2003.⁵ The central aims of the research are twofold: (1) to develop a protocol for cataloguing, via online dockets and other advances in digital technology, the modes of participation that are used on a rule-by-rule basis, and (2) to assess the utility of this protocol by implementing it in the context of a series of rules for which the requisite data sources are readily available through electronic means. The immediate result will be an unprecedented comprehensive description of the forms of participation that occur in rulemaking at the DOT, as well as the regularity with which agency officials and stakeholders turn to each of these forms. More broadly, the research will make clear the feasibility and utility of launching a new mode of inquiry that, along side the electronic government innovations that are currently taking place inside the executive branch, has the potential to enhance the theory and practice of rulemaking fundamentally in the years and decades ahead.

⁴ The DOT's docket management system is located at <http://dms.dot.gov>.

⁵ Although the DOT's docket moved online in the mid-1990s, the documents for rulemakings that were in progress at that time were not generally converted from paper to electronic form. As a result, actions that were completed by the agency in the late 1990s were a mix of those documented the old way and those that were accessible via the Internet. It was not until several years later that the agency was by and large finishing up actions that had commenced subsequent to the launch of the new system. For this reason, the logistical difficulties of collecting information for rules completed prior to 2001 are significantly greater than those associated with actions taken in more recent years.

THE DATA COLLECTION PROTOCOL

The immediate task is to develop a protocol that makes it possible to reconstruct the participatory histories of a large number of rules in a manner that is both expeditious and thorough. Inevitably, implementation of the protocol will be no small endeavor, even with the utilization of electronic dockets and other readily available online resources. Just as inevitably, there will be contacts between agency officials and outside parties that are not captured by the protocol. Such gaps are a natural byproduct of using official written records, with all of their potential incompleteness and bias, as the primary sources for information about public involvement in rulemaking.⁶

IDENTIFYING THE RULES

The first step in the protocol is to identify the set of rules that will serve as the units of analysis. The source for this identification is the Unified Agenda, a series of documents published twice a year in the *Federal Register*. In the Unified Agenda, agencies from across the government provide information about all of the rulemakings that they are currently working on, as well as those that they plan to initiate in the near future and those that have recently been finalized. It is this last set of rules, completed actions, that serves as the foundation of the data collection effort. The aim is to create an inventory of rules that were reported as completed by the DOT between 2001 and 2003.

The Unified Agenda is ideal for such a task because it is readily accessible via the Internet and serves as a central clearinghouse for information about rulemaking activities.⁷ The document obviates, in other words, the need to scour multiple sources, such as hundreds of daily issues of the *Federal Register*, for documentary evidence of actions that have been completed. The Unified Agenda has the additional advantage of cataloguing all of the actions that agencies have stopped working on, no matter what the reason for the stoppage and regardless of whether the stoppage is recorded in other publicly available repositories. For example, some completed actions are rulemakings in progress that agencies have withdrawn from further consideration for a variety of reasons, such as a change in priorities or the inability to craft a rule that satisfies stakeholders. Such withdrawn

⁶ One way in which the nature and severity of this limitation might ultimately be assessed is by supplementing archival data with surveys and interviews of agency officials and parties with a stake in particular rulemakings. In general, multiple method data gathering and cross-checking are valuable instruments in any empirical approach to inquiry.

⁷ The Unified Agenda can be found at <http://www.gpoaccess.gov/ua/index.html>.

actions are not always announced in the *Federal Register*, particularly when the stoppage occurs at an early stage in the rulemaking process. A failure to identify and include these actions in the analysis would result in an incomplete and potentially biased account of public involvement, especially if actions that are withdrawn tend to be associated with particular forms of participation. In the end, the use of the Unified Agenda ensures that the set of rulemakings under study represents as complete a snapshot as possible of the activities that the DOT declared as finished between 2001 and 2003.

Tables 1 and 2 present brief excerpts of the information contained in the Unified Agenda that was published on December 22, 2003. Table 1 is a list of all of the actions that were reported as completed by the Federal Aviation Administration (FAA), one of the most active rulemaking agencies within the DOT. Each action is assigned a pair of identification numbers, and actions that are deemed significant by the DOT are denoted with a "+." Table 2 presents a more detailed description of one of these twenty-two actions, a rulemaking designed to reduce the number of accidents and fatalities that occur in air tours over Hawaii. As this table demonstrates, the Unified Agenda provides an assortment of basic information about rulemaking activities, including the legal authority behind the action and the person at the agency who serves as the contact for initial inquiries. A timetable that marks the major highlights of the rulemaking is also provided. In the case of the Hawaiian air tour rule, the FAA published a proposal on August 8, 2003 and then issued the final version less than three months later.

Overall, there were ninety-two actions reported as completed in the December 22, 2003 Unified Agenda. These actions, along with those that were listed in the five other Unified Agendas published between 2001 and 2003, serve as the units of analysis in this research. The total number of units is 584, broken down as indicated in Table 3. Rulemaking activities were anything but constant over time and across agencies. The number of completed actions ranged from sixty in the December 3, 2001 Unified Agenda to more than one hundred in the Unified Agendas published on December 9, 2002 and May 27, 2003. The National Highway Traffic Safety Administration (NHTSA) was consistently among the most prolific rule producing agencies, completing an average of about seventeen actions per Unified Agenda. In contrast, some agencies, like the Maritime Administration, issued barely more than a handful of rules during the entire period under study.

In sum, the Unified Agenda is well suited to serve as the source for a definitive inventory of the rulemaking activities of the DOT, as well as other agencies of the federal government. The Unified Agenda is also valuable in that it contains information about the public

involvement that occurs during the course of rulemakings. For example, the detailed description of the Hawaiian air tour rule indicates that the FAA published a notice of proposed rulemaking. This description, however, does not document how many comments, if any, were submitted in response to the FAA's proposal. Nor does the description highlight if there were other forms of communication that took place between FAA officials and parties with a stake in the agency's action. In general, the Unified Agenda provides a thumbnail sketch, rather than a comprehensive documentation, of the modes of participation that occur during rulemakings. As a result, other sources must be utilized if participation in all, or at least most, of its forms is to be catalogued effectively.

TRACKING PUBLIC PARTICIPATION

The two additional sources that are used to track public participation are the text of the final *Federal Register* notice published during the rulemaking and the docket that serves as the repository for the rulemaking's official written record. Dockets contain detailed arrays of first-hand information about participation, from the comments submitted in response to proposed rules to the minutes of public hearings and advisory committee meetings. Similarly, the texts of final *Federal Register* notices more often than not include narratives that document at great length the procedural histories of rulemakings. With information from the Unified Agenda in hand, both of these sources can generally be obtained without much difficulty. For each completed action, the timetable in the detailed Unified Agenda description lists the *Federal Register* notices that were issued as part of the rulemaking. From this timetable, the last substantive action taken by the agency can be identified, and the *Federal Register* citation for this action can be used to retrieve the document via the Internet.⁸ For the Hawaiian air tour rule, the final action was published on October 23, 2003, when the FAA extended its requirements for equipment, safe altitudes, and aircraft operational limitations.

For many rulemakings, the identification of the final substantive action is quite straightforward, in that this action is the rule itself or the withdrawal of a rulemaking in progress from further consideration.⁹

⁸ The most obvious website for this task is the official online home of the Federal Register, <http://www.gpoaccess.gov/fr/>. There are, however, alternative sources, such as Lexis-Nexis's Federal Register database.

⁹ The use of the word "substantive" is important and merits explanation. Agencies sometimes publish Federal Register notices after the issuance of final rules, as when compliance deadlines are extended or typographical errors are corrected. In these cases, the

On occasion, however, the information contained in the Unified Agenda timetable is not sufficient for making this determination unambiguously. In such cases, the texts of the *Federal Register* notices in question are directly examined to ascertain which one is most appropriately deemed the agency's final substantive action. For example, the DOT's Office of the Secretary reported as completed in the December 22, 2003 Unified Agenda an action to relocate the time zone boundary in North Dakota. The timetable associated with this action includes a final rule issued on July 22, 2003 and a final action issued on August 18, 2003. Upon closer inspection, it turns out that the final action was in part a technical correction to the earlier document. For this reason, the final rule is considered to be the agency's last substantive notice and is retrieved for data collection purposes.

The final piece of information to be assembled is the docket associated with each completed action. Each docket has an identification number, which is generally listed in the action's final *Federal Register* notice and sometimes in the detailed Unified Agenda description. With this number in hand, the vast majority of dockets for the actions under study can be accessed via simple searches of the DOT's electronic rulemaking repository. Such searches produce lists of the documents contained in the accessed dockets. Table 4 presents results of the docket search for the North Dakota time zone rulemaking. This docket contains only two documents, a notice of proposed rulemaking published on September 17, 2002 and the final rule published nearly a year later. In general, it is not uncommon for dockets to consist of a relatively small number of documents. In some instances, however, dockets are much more voluminous and are filled with hundreds and occasionally thousands of distinct records.¹⁰

document that is retrieved for data collection purposes is not literally the final notice, but the notice in which the action itself is most comprehensively stated and justified.

¹⁰ As is the case with searches for final *Federal Register* notices, docket queries can lead to the identification of more than one repository that is potentially associated with the rulemaking in question. In fact, two separate numbers were produced in the search for dockets associated with the North Dakota time zone rulemaking. In such situations, each of the dockets is directly inspected to ensure that it indeed contains documents from the relevant rulemaking, as was the case with both time zone dockets. Dockets that do not fall into this category are discarded from the data collection effort.

For some completed actions, a docket cannot be identified and retrieved. The reasons for such empty searches are at least threefold. It may be that there is no docket associated with the rulemaking. This outcome is common for rulemakings that are terminated at an early stage of the process, such as before a proposed rule is published in the *Federal Register*. It may also be that the docket number is not listed in either the final *Federal Register* notice or the detailed Unified Agenda description. Finally, it may be that the docket is not included in the DOT's electronic management system, but rather can be viewed only, if at all, in paper form via a visit to one of the agency's docket rooms. For rulemakings where no docket exists or

THE CODING RULES

With all of the written records assembled, the crucial next step is to devise and implement a system for coding public involvement on a rule-by-rule basis. Most broadly, the aim of this system is to provide a reliable, well-documented way to comb through volumes of records in search of participation in all of its noted forms. Such an effort is valuable in an immediate sense in that it will be used to offer answers to the following questions:

- How regularly did the public participate in the development of rules completed by the DOT between 2001 and 2003?
- Were there many DOT actions completed without prior publication of a notice of proposed rulemaking?
- Is negotiated rulemaking a form of public involvement that was used in only the rarest of circumstances?
- To what extent did stakeholders have the opportunity to participate in rulemaking via modes that occupy the procedural ground between the archetypes of commenting on proposed rules and serving on negotiated rulemaking committees?
- What specifically are the modes that occupy this middle ground, and how often was each of these modes a part of the rulemaking process?

Fundamentally, the approach to coding is rather straightforward, albeit labor intensive and time consuming to apply to a large number of rules. For each rule, the detailed Unified Agenda description, text of the final *Federal Register* document, and docket are searched for evidence of any form of participation. In searching the Unified Agenda, there are a variety of rules of thumb that guide the process.¹¹ To take one example, the timetable is inspected to see if there was a notice of proposed rulemaking that invited comments from interested parties. To take another, the abstract is examined for mention that an advisory committee was consulted during the development of the rule. In general, the coding guidelines are designed to focus attention on the areas of the Unified Agenda where agencies are inclined to specify the ways in which the public was involved in rulemakings.

can be located, the Unified Agenda entry and the final *Federal Register* notice (if there was in fact such a notice) serve, by necessity, as the sources for tracking public participation.

¹¹ A guidance document has been drawn up that lays out in full detail the rules for coding public participation. This document is available from the author upon request.

The task is a bit more difficult to manage when it comes to identifying the modes of participation that are documented in *Federal Register* notices. Although many notices are rather brief, some consist of dozens or even hundreds of pages of text. With this volume of material in mind, the approach taken is to scan the opening sections of notices for discussions of public involvement. It is in these sections, which have headings such as Summary, Background, Proceedings to Date, and Discussion of Comments, that agencies generally recap the procedural histories of rulemakings. Even with this limited focus, the coding task is daunting on the occasions when the opening sections of notices are of particularly great length. The rule of thumb that guides this task is to look for statements that specifically mention public involvement of any sort. For example, the November 18, 2002 final notice for NHTSA's action on enhancing consumer information about tires and tire safety has a section documenting an advance notice of proposed rulemaking that the agency had issued two years earlier. The purpose of this advance notice was for the agency to announce its rulemaking plans and to ask stakeholders a variety of preliminary questions prior to the crafting of a full-blown proposal.

The final coding task is to look through the lists of documents contained in dockets for evidence of public involvement. For the tire information rule, one of these documents is the advance notice of proposed rulemaking discussed in NHTSA's final action. The protocol's multiple source approach to identifying participation regularly results in this type of confirmation. The approach also has the advantage of uncovering forms of participation that are documented in one source but not the others. According to the tire information docket, NHTSA officials engaged in *ex parte* contacts with representatives of General Motors and the Ford Motor Company. These meetings, to which other parties with a stake in the rulemaking were not invited, were noted in neither the Unified Agenda nor the *Federal Register*.

A last advantage of the multiple source approach is that uncertainties in one document can often be resolved through information contained in the others. On August 20, 2002, the Office of the Secretary finalized an action that established procedures for compensating air carriers for financial losses sustained as a result of the September 11, 2001 terrorist attacks. According to the timetable laid out in the Unified Agenda, the agency issued both a notice of proposed rulemaking and a final rule on the same day during the course of the rulemaking, nearly eight months before the action was ultimately completed. What is to be made of this curious pattern, specifically with regard to the participation that occurred in response to these notices? An examination of the final *Federal Register* document provides the needed clarification. To ensure a swift

response to the air industry's post-9/11 crisis, the agency addressed basic issues such as eligibility and deadlines for application in a final rule that took effect immediately. At the same time, the agency requested comments on more complex and difficult issues that it was not able to address satisfactorily without prior stakeholder input. The final action completed the rulemaking by responding to the comments that the agency received and making the necessary adjustments to the rule that had previously been published. As this example illustrates, the data collection protocol and coding rules are capable of unpacking the participatory histories of not only rulemakings that follow well-established procedures, but also those that entail unusual or even unique modes of decision making. In the end, the patterns of participation that emerge are the product of a methodology that breaks new ground by making it possible to assemble and catalogue information for a large number of rules in a relatively straightforward and expeditious manner.

THE PROTOCOL V. CONVENTIONAL APPROACHES TO DATA COLLECTION

Although the advantages of the Internet-based approach to data collection just outlined may at some level be readily apparent, is it possible to discern in a more precise way its value added over approaches that do not rely as fundamentally on emerging resources in information technology? One initial gauge is to contrast the scope of the data generated via the protocol with that of existing analyses of public involvement in rulemaking, particularly those that are archival in their orientation.

An immediate observation to come out of such a comparison is that much previous research focuses on a single rulemaking or a very limited number of agency actions. For example, several of the most detailed investigations of the use and efficacy of the notice and comment process address individual rulemakings, specifically executive branch decisions of particular salience and consequence (Balla 1998, 2000, Magat, Krupnick, and Harrington 1986). Even efforts that endeavor to be unusually broad in their application incorporate barely more than a handful of rulemakings into their analyses (Golden 1998, Langbein and Kerwin 2000).¹²

Having documented these limitations, it is also certainly the case that a few analyses have collected information for dozens of agency

¹² An underlying assumption of this evaluation is not that studies of many rulemakings are inherently superior to those that restrict their attention to one or a few episodes; rather, it is that there is now especially much to gain from a large-scale mode of inquiry, given the virtual absence of such an approach in the extant literature.

actions. These analyses, however, are themselves limited in the scope of the data on public participation that are sought and considered. Relying on searches of *Federal Register* notices and other published listings, Coglianese (1997) tracks the initiation of and outcomes associated with sixty-seven negotiated rulemakings over a thirteen-year period. Similarly, Balla and Wright (2003) measure the time it took to develop 170 rules issued by federal agencies during the late 1990s, focusing in particular on the impact of advisory committees and negotiated rulemaking. These rules were distinctive in that all were considered major actions and, as a result, all were the subject of reports issued by the Office of Management and Budget, a fact that greatly enhanced the ease of data collection.

The bottom line is that the protocol described above has the practical effect of nearly tripling, from 204 to 584, the number of rules under investigation, in comparison to the most extensive previous data collection effort. This comparison, when viewed more broadly, significantly understates the value added of the protocol. By cataloguing participation in all of its forms, a list that includes roundtables, public hearings, and informal meetings, to name just a few, the protocol goes well beyond existing efforts, which invariably focus on particular forms in isolation. In the end, the breadth and the depth of the protocol jointly distinguish it in a fundamental way from preceding empirical work on public involvement in rulemaking.

Another benchmark against which to measure the marginal value of the protocol is the following counterfactual scenario and question. For any particular rulemaking, how much more quickly is it possible to assemble the requisite information via the protocol as opposed to the approach that would had to have been taken in the absence of the DOT's online docket management system? Take, for example, the FAA's Hawaiian air tour rulemaking. This rulemaking was initiated when fifteen helicopter operators and their pilots petitioned the agency to revise its regulations governing flight altitudes for air tours. These petitions were followed by the publication of a notice of proposed rulemaking, a public comment period during which the agency received more than 200 submissions, and the promulgation of a set of amendments to the regulation. Through the rule's online docket, this procedural history can be fully pieced together in a matter of minutes.

But what if the documents were available only in paper form in the DOT's docket room? As stated in the final rule,

You may review the public docket containing this final rule, any comments received, and any final disposition, in person in the Docket Management System office...between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. (U.S. Department of Transportation, Federal Aviation Administration 2003, 60832).

For researchers in and around the Washington, DC, where the docket room is located, such a visit is likely to consume a non-trivial portion of the work day, when travel time, time spent retrieving materials, and other considerations regarding the conduct of field work are taken into account. Although some of these fixed costs, in particular those associated with travel, can be reduced on a rule-by-rule basis by cataloguing information from multiple dockets in single visits, it is nonetheless all but certain that the time and resources expended via this approach would be many times greater than for the online retrieval process on which the protocol is based. This conclusion holds to an even greater magnitude for researchers located outside of the Washington, DC area, who inevitably would have to incur long-distance travel costs in their efforts to track public involvement in all of its forms for a large number of rulemakings. In the end, the transformational nature of the DOT's online docket system, and of ongoing advances in the application of information and communication technology to rulemaking, is readily observable and at some level measurable from a variety of distinct vantage points.

PATTERNS OF PARTICIPATION

At a most fundamental level, the information generated by the data collection protocol provides a uniquely detailed and broad perspective on the regularity with which the public participates in executive branch rulemaking, specifically rulemaking at the DOT. Of the 584 actions that were reported as completed by DOT agencies between 2001 and 2003, 376, or nearly two-thirds, were characterized by public involvement of one sort or another during their development. Table 5 provides an overview of some basic participation patterns.

For the most part, the 208 actions that entailed no discernible public input were distinctive in terms of the outcomes with which they were associated. Seventy-four of these actions were terminated or withdrawn from further consideration at various stages in their development. For example, the Federal Railroad Administration initiated, at the behest of Congress, a rulemaking to mitigate the effects of the discharge of human waste from trains in environmentally sensitive areas. This rulemaking became unnecessary, and was abandoned without public consultation, when Amtrak upgraded the relevant equipment in both its old and new passenger cars. Many of the remaining actions that entailed no public involvement were merged or transferred into other rulemakings. In the May 2003 Unified Agenda, more than five dozen Coast Guard actions were listed as completed by the DOT because the agency and all of its functions had

been transferred to the Department of Homeland Security two months earlier.

Not all actions that ended with outcomes other than the issuing of a rule were characterized by an absence of public involvement. In fact, a majority of withdrawals were preceded by participation of one form or another.¹³ On occasion, this participation was rather extensive, as when the Federal Highway Administration solicited and received dozens of comments on two *Federal Register* notices prior to withdrawing its proposal to establish standards for roadside communications systems in commercial vehicles. Because the public's input was in part responsible for a number of these withdrawals, it is vital to include actions with such outcomes in the inventory of rules, to avoid the inferential difficulties associated with selecting, or not selecting, cases on the basis of attributes central to rulemaking.

The importance of case selection is further apparent when the focus is restricted to actions that culminated in the promulgation of rules. Of these 343 actions, 293, or 85%, were characterized by public involvement at some point in their development, a much greater percentage than for completed actions in general. Regardless of such differences, the first lesson to take away from the analysis is that the public participates very regularly in the rulemaking activities of DOT agencies, at least in the period under investigation. With this regularity in mind, the next task is to lay out the frequency with which specific modes of participation occurred, both in isolation and in combination with one another.

COMMENTING

Traditionally, the most common single form of public involvement is commenting on notices of proposed rulemaking. The prevalence of such commenting during DOT proceedings is consistent with the pattern that has been uncovered in other contexts (Kerwin 2003, 179-80), in that roughly half of the agency's completed actions were preceded by the publication of a proposed rule. More specifically, there were 151 actions where (a) the only discernible form of participation was commenting on a notice of proposed rulemaking, and (b) the ultimate disposition was the promulgation of a final rule. This particular combination of procedure and outcome was the most regular

¹³ Ninety-three of the rulemakings ended with withdrawals. In sixty-two of these withdrawals, there had been some form of public involvement while the rulemaking was in progress.

pattern in the actions reported as completed by the DOT between 2001 and 2003.

To what extent did the DOT turn to other forms of commenting as substitutes or complements for notices of proposed rulemaking? There were sixty-eight cases where the agency solicited comments on a final rule or an interim final rule. Most of these rules were issued without any prior opportunity for public comment. For example, the Research and Special Programs Administration issued an interim final rule on the placement of "poison inhalation hazard" labels on packages and vehicles in international transportation. This rule was not preceded by a proposal because, due to legal issues that were being considered outside of the agency's jurisdiction, immediate action was needed to forestall difficulties in the shipping of particular types of hazardous materials. The agency received a handful of comments on the action and addressed these comments by making modest changes in the rule it had promulgated.

Other forms of commenting also included advance notices of proposed rulemaking and supplemental notices of proposed rulemaking, which were published during forty and thirteen of the rulemakings, respectively. A common pattern was for the DOT to seek feedback on its initial ideas and questions through advance notices and then to incorporate this feedback into proposed rules. In those cases where advance notices were not followed by proposals, the action was generally terminated or withdrawn, sometimes as a direct result of the negative tone of the comments that had been submitted.

The bottom line is that commenting remains, at least in the context of the DOT actions under consideration, a common and vital form of public involvement, more than a half century after the notice and comment process became an institutionalized feature of rulemaking. Although notices of proposed rulemaking are the most common vehicles through which comments are delivered and interpreted, the DOT regularly seeks comments during virtually all stages, from preliminary to penultimate, of its rulemaking proceedings.

NEGOTIATED RULEMAKING

Not only was there diversity in commenting as a form of participation, there was also great variety in the other forms through which the public took part in DOT rulemakings. Notably, this variety did not include negotiated rulemaking, as not one of the 584 rules was developed via this approach. Nevertheless, the DOT incorporated principles of negotiated rulemaking into a number of its actions. In May 2001, the Federal Highway Administration reported several completed actions that revised its Manual on Uniform Traffic Control Devices, which contains standards designed to enhance the efficiency

and safety of the nation's roadways. Rather than draft the revisions itself, the agency delegated this authority to a group whose membership was drawn from the American Association of State Highway and Transportation Officials, the National Association of County Engineers, the American Public Works Association, and other organizations with expertise in the operation of traffic control devices. The agency then incorporated much of this group's work into several notices of proposed amendments that were published in the *Federal Register*. In these ways, the process of revising the manual closely resembled key aspects of negotiated rulemaking, although in the end unanimous concurrence was not the explicit aim of either the agency or the working group.

PARTICIPATION BETWEEN COMMENTING AND NEGOTIATION

Public participation occurred in a variety of ways that fall between commenting and negotiation. Interactive forums such as hearings, meetings, roundtables, and focus groups took place during more than fifty of the rulemakings. After publishing a proposed rule on the power braking systems used in non-passenger trains, the Federal Railroad Administration held a series of public hearings in Chicago, Sacramento, Newark, NJ, and Washington, DC. The explicit purpose of these hearings was to allow interested parties the opportunity to comment in person on aspects of the agency's proposal. As a result of the large amount of contradictory and hostile testimony delivered at these hearings, the agency deferred acting on the proposal for several years. During this time, the agency's Railroad Safety Advisory Committee worked at bringing the contending parties toward a more common position, a task at which it ultimately failed. In general, it was not uncommon for the DOT to turn to multiple forms of interaction and deliberation in specific cases where stakeholder interest and conflict were particularly pronounced.

Several advisory committees, such as the Aviation Rulemaking Advisory Committee and the Technical Hazardous Liquid Pipeline Safety Standards Committee, were used on numerous occasions. The tasks given to these advisory committees ran the gamut, from drafting and evaluating proposed rules to working with foreign entities in harmonizing transportation standards across national boundaries. Consistent with the balance requirement of the FACA, the advisory committees represented broad cross-sections of DOT stakeholders. In the case of the pipeline safety committee, its 15 members were drawn not only from industry and government, but from environmental and public interest organizations as well.

A common way in which DOT rulemakings were initiated was through petitions filed at the agency by individuals and organizations.

In petitions, stakeholders ask agencies to reconsider final rules that have been issued, either in part or in their entirety. Following the submission of petitions, agencies respond by opening new rulemakings and ultimately determining whether to accept or reject the petitioner's request. Along the way, the agency may solicit public input via commenting or other forms of participation. Among the DOT rulemakings, there were sixty-nine cases where petitions were filed. Notices of proposed rulemaking were subsequently published in twenty-seven of these instances. These notices serve as indicators that agency officials were not prepared to reach verdicts on the merits of the petitions without first obtaining feedback from others in the stakeholder community. One such case occurred when an advertising firm asked the agency to increase the maximum allowable size of firms seeking to participate as disadvantaged business enterprises in airport concessions. In the end, the agency folded this request into a larger rulemaking that adjusted the standards for disadvantaged business enterprises in transportation settings of all kinds.

To this point, the forms of participation that have been discussed are formal and fully public in nature, in that agencies provide stakeholders with advance notice of opportunities to take part in rulemakings and consider the input of all parties that respond to these opportunities. It is well established, however, that much contact between agencies and stakeholders occurs outside of such channels, through what might be called "informal" means of communication (Furlong 1999, Kerwin 2003). Rather than being easy to characterize, informal communications vary in at least three key respects. First, they differ in the mediums through which the contact occurs. In some instances, DOT officials met with stakeholders in person, while in others the exchanges took place via telephone or written letters. Second, informal communications differ in the stage of the rulemaking process during which they occur. Several months after the FAA proposed to upgrade aircraft flammability standards, representatives of Boeing delivered a presentation at the agency's headquarters, to express fundamental reservations about the costs and substance of the proposal and to make the case that the agency had not sufficiently considered the manufacturer's comments on the notice of proposed rulemaking. In other rulemakings, these kinds of exchanges occurred well before publication of the proposed rule, with stakeholders seeking to influence the agency's initial thinking on the substantive direction of the proceedings. Third, informal communications differ in terms of the party that initiates the contact. On December 17, 2001, FAA officials summoned Boeing representatives to a meeting to clarify the company's position on resolution requirements for digital flight data recorders. The aircraft flammability meeting, in contrast, was held solely at the behest of Boeing.

A common attribute of informal communications, regardless of their specific characteristics, is that informal communications are inherently more difficult to observe via written records than forms of participation such as commenting on proposed rules and membership on negotiated rulemaking committees. Despite these difficulties, informal contacts between agency officials and stakeholders were discerned in fifty-seven of the rulemakings. Together these contacts constitute the set of informal interactions that were deemed significant enough to merit mention in the Unified Agenda, in *Federal Register* notices, and in dockets. By including these contacts in the data collection protocol, a much richer account of public participation emerges than could otherwise be assembled.

This richness is particularly apparent when informal communications and other forms of public input are jointly tracked for specific rulemakings. All but four of the rulemakings where there were informal contacts were also characterized by commenting on *Federal Register* notices of one type or another. In addition, about half of these rulemakings also entailed the holding of hearings, meetings, and similar public forums. There was a subset of rulemakings, in other words, where participation was unusually extensive and varied. One such rulemaking was the Federal Motor Carrier Safety Administration's action to protect against shifting and falling cargo in interstate commercial transportation. The public was engaged in this rulemaking over a six-year period in all kinds of ways, including several comment periods, meetings held in Denver and Houston, a working group that was multinational in its composition, and informal written correspondences that took place outside of the notice and comment process.

The presence of such patterns suggests that, at least in certain contexts, different forms of participation serve as complements rather than as substitutes for one another. In such rulemakings, agencies are inclined both to solicit comments and turn to interactive and deliberative approaches to public involvement. If such multiple approach rulemakings constitute one general type of participatory environment, then the traditional APA pattern of a notice of proposed rulemaking, a public comment period, and a final rule comprises the second common form. A third frequently occurring regime consists of those rulemakings where comments are solicited only on final actions, after these actions have been issued with the full force of the law. Finally, there are many rulemakings where there is little, if any, public involvement of any sort. Table 6 summarizes the participatory regimes that regularly characterized rulemaking at the DOT in the years under study. The identification of these four common classes is an initial accomplishment of the data collection protocol and hints at the potential of this line of inquiry to enhance greatly the

understanding of rulemaking and the public's involvement in this most important mode of policymaking.

CONCLUSION

At the outset, a central observation of this research was that some, perhaps much, participation in rulemaking occurs through neither commenting on proposed rules nor serving on negotiated rulemaking committees, despite the fact that scholars have devoted the bulk of their attention to these two archetypal instruments of public involvement. The analysis presented here has not only verified this observation, but has done so in a manner and in a context that breaks important new ground. The design of a new data collection protocol, and the implementation of this protocol for 584 DOT actions completed between 2001 and 2003, has demonstrated that the participatory histories of large numbers of rulemakings can be readily assembled via official agency records. This approach is only now becoming feasible, thanks to ongoing advances in information technology, most notably online docket systems, that have significantly enhanced the ease with which rulemaking documents can be accessed and retrieved.

The information generated by the protocol not only confirms the prevalence of participation "between" commenting and negotiation, it also reveals that such forms of public input serve, in different settings, as both complements and substitutes to the baseline of notice and comment rulemaking. Altogether, four participatory regimes emerged as regular features of the DOT's rulemaking environment, including those actions where the public was not involved in any way in the shaping of the agency's decisions, and those where stakeholder input was prevalent in a host of forms from the initiation of the proceeding all the way to its completion.

If researchers, not to mention practitioners, are indeed on the cusp of a new era in rulemaking, then what is this era likely to hold for the continued application of information and communication technology and for the study of this most common and vital mode of policymaking? As the eRulemaking Initiative moves forward in the years ahead, the Internet and related digital developments will permeate to an ever-increasing extent the record keeping practices of agencies from across the federal government. Perhaps more importantly in the long run, information and communication technology has the potential to transform the conduct and management of rulemaking, by making it easier for agencies to solicit, receive, and process the information generated by public comments, negotiated rulemaking committees, and all of the instruments of stakeholder participation that occupy the "space" between these archetypes.

This possibility, simply stated at this point, raises a number of specific questions for the research community. What are the conditions under which particular forms and regimes of public involvement are most likely to occur? What connections, if any, exist between participatory regimes and key procedural concerns, such as the time it takes to issue rules and the amount of litigation that is associated with agency actions? Does public participation in any or all of its forms affect the substance of outcomes and stakeholder satisfaction with these outcomes? In the end, the lasting contribution of endeavors such as this descriptive account of public involvement in DOT rulemaking may be that these endeavors have laid the substantive and methodological groundwork for a research agenda on policymaking in the executive branch that is broader and more explanatory in its orientation.

Table 1: Actions Listed as Completed by the Federal Aviation Administration—December 22, 2003 Unified Agenda

Federal Aviation Administration--Completed Actions		
Sequence Number	Title	Regulation Identification Number
2249	Objects Affecting Navigable Airspace.....	2120--RA09
2250	Miscellaneous Amendments.....	2120--RA50
2251	+Improved Water Survival Equipment.....	2120--RC72
2252	Type Certificates for Some Surplus Aircraft of the Armed Forces.....	2120--RE41
2253	Revised Precision Approach Landing Systems Policy.....	2120--RG16
2254	+Improved Flammability Standards for Thermal/Acoustic Insulation Materials Used in Transport Category Airplanes.....	2120--RC91
2255	Special Flight Rules in the Vicinity of Grand Canyon National Park.....	2120--RG97
2256	+Air Tour Operations in State of Hawaii.....	2120--RH02
2257	+Fractional Ownership.....	2120--RH06
2258	Material Strength Properties and Design Values.....	2120--RH36
2259	Lower Deck Service Compartments on Transport Category Airplanes.....	2120--RH38
2260	Harmonization of Noise Certification Standards for Propeller--Driven Small Airplanes.....	2120--RH42
2261	Digital Flight Data Recorder Resolutions Requirements.....	2120--RH46
2262	Procedures for Reimbursement of Airports, On--Airport Parking Lots, and Vendors of On--Airfield Direct Services to Air Carriers for Security Mandates.....	2120--RH60
2263	+Reduced Vertical Separation Minimum in Domestic United States Airspace.....	2120--RH68
2264	Digital Flight Data Recorder Requirements -- Exception and Appendix Updates.....	2120--RH89
2265	Special Flight Rules in the Vicinity of Los Angeles International Airport.....	2120--RH92
2266	+Flightdeck Security on Large Cargo Airplanes.....	2120--RH96
2267	Flight Crew Compartment Access and Door Designs.....	2120--RH97
2268	DOD Commercial Air Carrier Evaluators.....	2120--AI00
2269	Disposition of Comments: Noise Certification Standards for Subsonic Jet and Subsonic Transport Category Large Airplanes; Transition to an All Stage 3 Fleet Operating in the 48 Contiguous States.....	2120--AI01
2270	Withdrawal of Proposed Rules: Miscellaneous Amendments; Improved Water Survival Equipment; Objects Affecting Navigable Airspace; Type Certificates for Some Surplus Aircraft of the Armed Forces.....	2120--AI02

Source: U.S. Department of Transportation, Office of the Secretary 2003b.

Table 2: Detailed Unified Agenda Entry for the FAA's Rulemaking on Hawaiian Air Tour Operations

2256. +AIR TOUR OPERATIONS IN STATE OF HAWAII

Priority: Other Significant

Legal Authority: 49 USC 106(g); 49 USC 40103; 49 USC 40113; 49 USC 40120; 49 USC 44101; 49 USC 44701; 49 USC 44711; 49 USC 44712; 49 USC 44715; 49 USC 44717; 49 USC 44722; 49 USC 46306; 49 USC 46315; 49 USC 46316; 49 USC 46502; 49 USC 46504; 49 USC 46506; 49 USC 47122; 49 USC 47508; 49 USC 47528 to 47530

CFR Citation: 14 CFR 91

Legal Deadline: None

Abstract: This action proposes to extend SFAR 71, which established certain procedural, operational, and equipment requirements for air tour operators in the State of Hawaii. The FAA intends to issue a national air tour safety proposal in the near future, but until this rulemaking becomes final, there is a need to extend SFAR 71 to ensure the continuing safe environment for conducting air tours in Hawaii. During the 9-year period between 1982 and 1991, there were 11 air tour accidents with 24 fatalities in Hawaii. The apparent causes of the accidents ranged from engine power loss to encounters with adverse weather. On September 26, 1994, the FAA published an emergency final rule as SFAR 71. The rule established additional operating procedures, including minimum safe altitudes (and associated increases in visual flight rules weather minimums), minimum equipment requirements, and operational limitations for air tour aircraft in the State of Hawaii. SFAR 71 was subsequently extended until October 26, 2003. This rulemaking is significant because of substantial public interest.

Timetable:

Action	Date	FR Cite
NPRM	08/08/03	68 FR 47269
Final Action	10/23/03	68 FR 60831
Final Action Effective	10/26/03	

Regulatory Flexibility Analysis Required: No

Small Entities Affected: No

Government Levels Affected: None

Agency Contact: Gary Davis, Flight Standards Service, Department of Transportation, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591
Phone: 202 267-8166

RIN: 2120-AH02

Source: U.S. Department of Transportation, Office of the Secretary 2003b.

Table 3: Completed Actions by Unified Agenda and Agency

<u>Agency</u>	<u>Unified Agenda</u>					
	May 2001	Dec. 2001	May 2002	Dec. 2002	May 2003	Dec. 2003
<i>Total</i>						
Bureau of Transportation Statistics	0	0	0	2	3	0
Federal Aviation Administration	19	15	12	17	33	22
Federal Highway Administration	15	2	7	10	6	7
Federal Motor Carrier Safety Administration	13	3	2	6	7	5
Federal Railroad Administration	6	7	5	2	6	7
Federal Transit Administration	1	2	1	3	4	1
Maritime Administration	1	2	1	1	1	2
National Highway Traffic Safety Administration	14	13	7	18	26	26
Office of the Secretary	5	4	1	17	6	13
Research and Special Programs Administration	7	3	9	15	7	8
Saint Lawrence Seaway Development Corporation	0	1	2	0	3	1
Transportation Security Administration	-	-	0	0	10	-
United States Coast Guard	6	8	17	14	64	-
<i>Total</i>	87	60	64	105	176	92
						584

Source: U.S. Department of Transportation, Office of the Secretary 2001a, 2001b, 2002a, 2002b, 2003a, 2003b. A “-” indicates that the agency was not part of the DOT at the time when the particular Unified Agenda was published. The Transportation Security Agency (TSA) came into existence on February 17, 2002 and first listed completed actions in the May 27, 2003 Unified Agenda. Along with the United States Coast Guard, the TSA was transferred from the DOT to the Department of Homeland Security on March 1, 2003.

Table 4: Docket for the DOT's North Dakota Time Zone Rulemaking

Simple Search	Advanced Search	Comment/ Submissions	Reports	Help	Feedback/ Support
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Docket Search Results				
Displaying 1 thru 2 of 2 Records / Displaying 2 of 2 Submissions [Help]				
Reverse Order				
Document Number	Document Type	Filing Date	Title	Files
QST-2002-13361-1	Federal Register Publication	09/17/2002	Notice of Proposed Rulemaking	PDF (42129 bytes) PDF (46657 bytes) 3 Pages
QST-2002-13361-2	Federal Register Publication	07/22/2003	Final Rule	PDF (44177 bytes) PDF (48932 bytes) 3 Pages
Reverse Order				
Search Again				

Simple Search	Advanced Search	Comment/ Submissions	Reports	Help	Feedback/ Support
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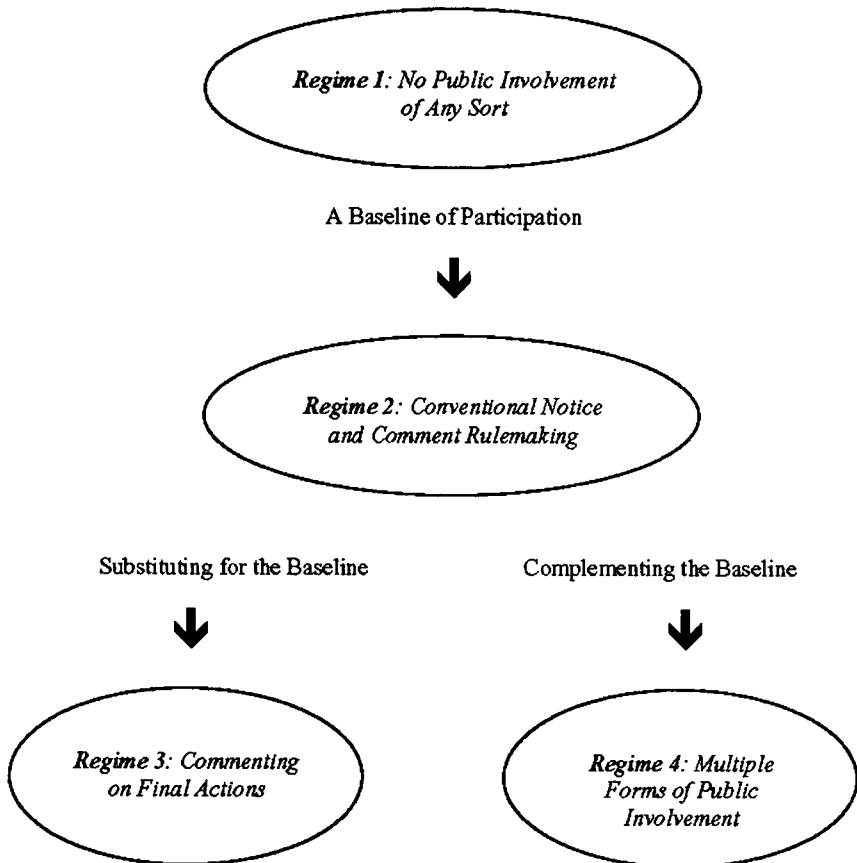
DMS2000 Wednesday, March 17, 2004

Source: The DOT Docket Management System, accessed via <http://dms.dot.gov>.

Table 5: Basic Patterns in Public Participation

<u>Form of Participation</u>	Final Action	<u>Outcome</u>			
		Terminated/Withdrawn	Merged/Transferred Into Another Rulemaking	Other	Total
No Participation at All	50	74	81	3	208
Some Form of Participation	293	74	9	0	376
Total	343	148	90	3	584
<i>For the 376 Rulemakings Where There Was Some Form of Participation:</i>					
Commenting on a Notice Of Proposed Rulemaking	195	42	5	0	242
Other Forms of Commenting	112	30	4	0	146
Participation Beyond Commenting	135	34	4	0	173

Note: The entries in the cells are the number of rulemakings that fall into particular categories. The columns in the bottom portion of the table do not sum up to the total number of completed actions characterized by particular outcomes because some rulemakings entailed multiple forms of public input. "Other Forms of Commenting" include advance notices of proposed rulemaking, interim final rules, and other types of *Federal Register* notices. "Participation Beyond Commenting" includes public hearings, advisory committees, informal communications, and other forms of participation that occurred outside of the notice and comment process.

Table 6: Common Participatory Regimes in DOT Rulemakings

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